

Opinion Number 97-004

December 22, 1997
Honorable Melvin R. Brown
House of Representatives
318 State Capitol
Salt Lake City, Utah 84114

Re: Opinion 97-004: Materials Adopted by the Utah State Board of Education

Dear Representative Brown:

Your request of November 20, 1997, for an opinion regarding State Board of Education approval of text books and materials used in school districts was referred to me for response. Your precise questions are:

1. [w]hether . . . there is a clear requirement in law that school districts must only use materials adopted by the State Board of Education?
2. If the law is not clear in all instances, what are the conditions under which school districts would be required to only purchase and use material on the adopted list?
3. What if any is the significance of whether state funds are used to purchase textbooks and other educational materials. More specifically, if no state money is used in the purchase, do school districts have the autonomy under state law to select and put into use materials which are not approved by the state?

As a preliminary matter it will be helpful to briefly describe the State system for approving texts. In Utah's system of public education the State Board of Education appoints a State Textbook Commission which considers public school textbooks and recommends appropriate textbooks for adoption by the State Board of Education, Utah Code Ann. § 53A-14-101. The State Board then reviews the recommendations and adopts those textbooks which are appropriate. The adopted textbooks become mandatory for use in the public schools. The approved textbooks are placed on a list of adopted textbooks so every district, school administrator and State education official is aware of the specific textbooks approved for use in the public schools. Textbooks are reviewed periodically and may be added to or removed from the list, Utah Code Ann. § 53A-14-102. Additionally, the Textbook Commission may approve a particular textbook for pilot or trial use subject to reasonable conditions and limitations for such use. Utah Code of Administrative Rules, Education, R277-408-1.J.

It is important to distinguish generally between the terms "textbook" and "materials". It appears that the general definitions from the Education Code and Board rules attempt to distinguish textbooks including textual materials in

particular, from instructional materials in general. The Education Code defines "textbooks" to include workbooks necessary to a particular course of study:

For the purposes of Sections § 53A-12-201 through § 53A-12-206, "textbooks" includes textbooks and workbooks necessary for participation in any instructional course. Textbooks shall not include personal or consumable items, such as pencils, papers, pens, erasers, notebooks, other items of personal use, or products which a student may purchase at his option, such as school publications, class rings, annuals, and similar items.

Utah Code Ann. § 53A-12-202.

The State Board rule defines "textbooks" in a somewhat more comprehensive manner to include textual materials intended to serve as principal sources of study over a significant portion of a particular course of study:

J. "Textbooks" means systematically arranged text materials, in harmony with the state curriculum framework and courses of study, which may be used by students as principal sources of study and which cover a significant portion of the course. These materials:

- (1) are designed for student use;
- (2) are accompanied by or contain teaching guides and study helps;
- (3) may be programmed or self-instructional; and
- (4) must appear on the list of state-adopted texts or be approved for pilot or trial use by the State Textbook Commission.

Utah Administrative Rules, R277-408-1.J.

From the foregoing statutes and State board Rule it appears that the intent of current law is to distinguish between textbooks including workbooks and other systematically organized principal textual materials, which are subject to State Board approval, and supplemental, incidental and temporary instructional materials which may be appropriate, relevant and helpful for a teacher or district, but which are not subject to State Board approval. Approval of texts as principal sources of study appears to be consistent with the State Board authority to establish curriculum requirements for courses of study in the public school system. Utah Code Ann. § 53A-13-101 et seq.

Our research reveals that there is very little litigation over use of textbooks in the public schools. In one Utah case, plaintiffs claimed that mandatory use of State approved textbooks was unconstitutional. The District Court dismissed the complaint. On appeal the Utah Supreme Court upheld the dismissal based on the individual plaintiff's lack of standing to challenge the textbook law. *Jenkins v. Swan*, 675 P.2d 1145 (Utah 1983). While the validity of the textbook statute was not directly decided, the effect of the court's decision was to preserve the statute.

This result is consistent with general law in the United States which uniformly recognizes the exclusive right of the State legislature to prescribe the process by which textbooks are selected for use in the public schools. 68 Am. Jur. 2d Schools Sec. 303.

With that background I will now proceed to respond to your three particular questions:

Question 1: [Is] there is a clear requirement in law that school districts must only use materials adopted by the State Board of Education?

Response: Yes. The law requires textbooks, workbooks, and other textual materials intended to be principal sources of study over a significant portion of the course, to be approved by the State Board of Education and appear on the list of adopted textbooks. Supplementary materials, which are not textbooks or principal textual materials but which are deemed relevant and helpful in a course for incidental use by the teacher, may be used without approval of the State Board of Education if consistent with district policy and other State law.

While the law makes a distinction between principal study materials and supplemental materials, the classification of specific "materials" may prove problematic in some cases. A more precise definition of textbooks and principal textual materials by Board rule may be helpful and should be considered. The rule could also indicate that other relevant materials intended for occasional, incidental and supplemental use need not be approved by the State Board so long as they are within sound local board policy and consistent with other State law.

Question 2: If the law is not clear in all instances, what are the conditions under which school districts would be required to only purchase and use material on the adopted list?

Response: The law is clear that the district must purchase and use those textbooks and principal textual materials which are approved by the State Board and placed on the list of adopted textbooks. The local board may not purchase and use textbooks and principal textual materials which are not approved and placed on the list, or for which trial use or pilot use has not been approved.

Other teaching material may be considered relevant and helpful to the course by the teacher, but is intended only for supplemental or incidental use and not as a principal source of study over a significant portion of the course. Such supplemental material need not be approved by the State Board, but must be consistent with local board policy and other State laws.

Question 3: What if any is the significance of whether state funds are used to purchase textbooks and other educational materials. More specifically, if no state money is used in the purchase, do school districts have the autonomy under state law to select and put into use materials which are not approved by the

state?

Response: No. The fact that no State funds are used to purchase textbooks and principal textual materials is not relevant to the requirement to use only those texts and textual materials approved by the State Board of Education. Textbooks may be paid for by the district from operating funds, the textbook fund or other available funds. Utah Code Ann. § 53A-12-204(5). There is no prohibition against the State supplying funds for textbooks or supplying the textbooks themselves to a particular district for a particular purpose. The source of the money is not relevant to the approval and the fact that local funds may be used cannot imply tacit authority to use a textbook or textual materials not approved by the State Board of Education. There is no authority for a district to purchase or use textbooks and textual materials without prior approval by the State Board of Education or State Textbook Commission.

CONCLUSION

Under current State statute, it is clear that textbooks and other principal textual materials must be approved by the State Board of Education prior to use in the public schools. Other related materials not intended to be a principal source of study and used only incidentally to supplement a course of study may be used without State Board approval provided such use is consistent with local board policy and other State law.

Because some confusion may arise out of indiscriminate use of the word "materials", it is suggested that the State Board of Education consider reviewing the definition of "textual materials" which are to be used with a textbook as a principal study source and therefore subject to Board approval.

Please let me know if you need more information or have further questions.

Very truly yours,

JOHN S. McALLISTER
Assistant Attorney General
Education Division
March 5, 1997